

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
ITT EDUCATIONAL SERVICES, INC., *et al.*¹) Case No. 16-07207-JMC-7A
)
Debtors.) Jointly Administered

**TRUSTEE’S MOTION TO COMPROMISE AND
SETTLE AVOIDANCE CLAIM AGAINST FACEBOOK, INC.**

Deborah J. Caruso, the chapter 7 trustee in this case (the “Trustee”), by counsel, pursuant to 11 U.S.C. §§ 105 and 363 and Rule 9019 of the Federal Rules of Bankruptcy Procedure, requests entry of an order authorizing the Trustee to compromise and settle all claims and causes of action related to Facebook, Inc. (“Facebook”), including but not limited to, those claims and causes of action related to the Avoidance Claim (as defined below) on the following grounds:

I. JURISDICTION

1. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicate for relief are sections 105 and 363 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

II. BACKGROUND

4. On September 16, 2016 (the “Petition Date”), ITT Educational Services, Inc. (“ITT”), ESI Service Corp. (“ESI”) and Daniel Webster College, Inc. (“Webster College,” and

¹ The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

together with ITT and ESI, the “Affiliated Debtors”) filed voluntary petitions for relief under chapter 7 of the Bankruptcy Code. The Trustee was appointed interim trustee under section 701 of the Bankruptcy Code in each of the Affiliated Debtors’ bankruptcy cases on the Petition Date, and in accordance with section 702(d) of the Bankruptcy Code, became the permanent case trustee on November 1, 2016 following the conclusion of the meeting of creditors held pursuant to section 341(a) of the Bankruptcy Code.

5. On October 4, 2016, the Court entered its *Order Granting Motion for Joint Administration of Chapter 7 Cases* [Docs 221 & 222], directing the Affiliated Debtors’ bankruptcy cases to be jointly administered for procedural purposes only.

6. Prior to the Petition Date, the Affiliated Debtors purchased online advertising from Facebook. Facebook charged the Affiliated Debtors’ a fee for the type of advertising purchased based on Facebook’s standard rates for advertising charged to other customers purchasing similar types of advertising.

7. On July 20, 2018, the Trustee filed a *Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548 and 550 and to Disallow Claims Pursuant to 11 U.S.C. § 502* (the “Complaint”) against Facebook, Adversary Proceeding No. 18-50193 (the “Adversary Proceeding”). In the Complaint, the Trustee seeks, in part, to avoid and recover, pursuant to chapter 5 of the Bankruptcy Code, transfers received by Facebook from the Affiliated Debtors in the amount of \$815,167.52 (the “Avoidance Claim”).

III. SETTLEMENT

8. In the interest of avoiding the uncertainties and expenses of further litigation, the Trustee and Facebook have reached a settlement, subject to Court approval, resolving all claims, including the Avoidance Claim. Attached and incorporated as Exhibit 1 is the *Settlement*

Agreement and Mutual Release (the “Settlement Agreement”) reflecting the agreement reached by the Trustee and Facebook.

9. The pertinent terms of the Settlement Agreement are as follows:
 - (a) Facebook is to pay the Trustee the sum of \$213,248.82 (the “Settlement Payment”) on or before December 4, 2018.
 - (b) Facebook has agreed to waive any right it may have under section 502(h) of the Bankruptcy Code to file a proof of claim (or to increase the amount set forth in an existing proof of claim) in the amount of the Settlement Payment.
 - (c) The Trustee and ServiceNow shall release each other and related parties from any and all claims, demands, obligations, judgments, actions, causes of action and/or liability, including without limitation, any claims arising from or relating in any way to the Avoidance Claim.
 - (d) Following the Settlement Effective Date, the Trustee shall file a notice of dismissal with prejudice in the Adversary Proceeding.

10. Because the Settlement Agreement provides for a full release of Facebook and is not limited to only those claims and causes of action related to the Avoidance Claim, the Trustee has elected to opt out of the settlement procedures for avoidance claims previously approved by the Court on May 30, 2018 [Doc 2556], and is seeking separate Court approval of the Settlement Agreement.

IV. RELIEF REQUESTED

11. The Trustee requests entry of an order, pursuant to sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019: (a) authorizing the Trustee, pursuant to the terms of the Settlement Agreement, to compromise and settle all claims and causes of action related to Facebook, including but not limited to, those claims and causes of action related to the Avoidance Claim; (b) approving the Settlement Agreement; and (c) authorizing the Trustee to

retain the Settlement Payment in the amount of \$213,248.82 for the general administration by the Affiliated Debtors' bankruptcy estates.

V. GROUNDS FOR GRANTING RELIEF

12. A court may authorize a trustee to enter into a settlement so long as it is a sound exercise of the trustee's business judgment. *See* 11 U.S.C. § 363(b); *In re UAL Corp.*, 443 F.3d 565, 571 (7th Cir. 2006) (use under section 363 of the Bankruptcy Code must "[make] good business sense"); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (section 363 involves exercise of fiduciary duties and requires an "articulated business justification"); *see also In re Olde Prairie Block Owners, LLC*, 448 B.R. 482, 492 (Bankr. N.D. Ill. 2011) (same). Moreover, when applying the "business judgment" standard to a use of estate property under section 363 of the Bankruptcy Code, a trustee's judgment is "entitled to great judicial deference as long as a sound business reason is given." *See In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012).

13. Similarly, Bankruptcy Rule 9019(a) sets forth the requirements for compromises and settlements and permits a bankruptcy court to approve a trustee's "compromise or settlement" after notice and a hearing, if such settlement is "fair and equitable . . . and in the best interests of the bankruptcy estate." *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994); *see also In re Energy Co-op., Inc.*, 886 F.2d 921, 927 (7th Cir. 1989) ("The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate."); *In re Smith*, No. 02-16450-JKC-7A, 2008 WL 4276171, at *2 (Bankr. S.D. Ind. Sept. 10, 2008) (same). Settlements should be approved unless "the settlement 'falls below the lowest point in the range of reasonableness.'" *In re Commercial Loan Corp.*, 316 B.R. 690, 698 (Bankr. N.D. Ill. 2004) (quoting *Energy Co-op.*, 886 F.2d at 929); *In re*

Doctors Hosp. of Hyde Park, Inc., 474 F.3d 421, 426 (7th Cir. 2007); *see also In re Artra Grp., Inc.*, 300 B.R. 699, 702 (Bankr. N.D. Ill. 2003). Settlements and compromises are favored in bankruptcy because they expedite case administration and reduce unnecessary administrative costs. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000). In determining whether a compromise is in the best interests of the estate, the Court must compare “the settlement’s terms with the litigation’s probable costs and probable benefits.” *In re Am. Reserve Corp.*, 841 F.2d 159, 161 (7th Cir. 1987); *see also Doctors Hosp.*, 474 F.3d at 426 (“Among the factors the court considers are the litigation’s probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets.”) (internal quotation marks and citations omitted); *Commercial Loan*, 316 B.R. at 697 (holding that relevant factors a bankruptcy court should consider in approving a settlement include “the litigation’s probability of success, its complexity, and its ‘attendant expense, inconvenience and delay’” (quoting *Am. Reserve Corp.*, 841 F.2d at 161)).

14. The Trustee has determined the settlement terms based on the merits of Facebook’s defenses to the Avoidance Claim and the risk and expense to the Affiliated Debtors’ bankruptcy estates if the Avoidance Claim was litigated. After review of Facebook’s defenses to the Avoidance Claim, the Trustee has determined the net liability to be less than the total gross amount of the Avoidance Claim based on the strength of the defenses under section 547 of the Bankruptcy Code. As such, the terms of the Settlement Agreement reflect a compromise between the parties, whereby Facebook is paying \$213,248.82 towards the net liability and waiving its right under section 502(h) of the Bankruptcy Code to file a proof of claim (or to increase the amount set forth in an existing proof of claim) in the amount of the Settlement Payment. Based upon these considerations and the Trustee’s business judgment, the Trustee

respectfully submits that the Settlement Agreement is fair, equitable, in the best interest of the Affiliated Debtors' bankruptcy estates and within the range of reasonableness for approval under Bankruptcy Rule 9019(a).

VI. NOTICE

15. Pursuant to the *Notice, Case Management and Administrative Procedures* (the "Case Management Procedures") approved by the Court on October 4, 2016 [Doc 220], the Trustee will serve a copy of this motion on the following (as defined in the Case Management Procedures): (a) the Core Group; (b) the Request for Notice List; (c) the Appearance List; and (d) Facebook.

NOTICE IS GIVEN, that pursuant to the Case Management Procedures, any objection to this motion must be in writing and filed with the Bankruptcy Clerk by no later than **4:00 p.m.** (prevailing Eastern Time) on **December 12, 2018**. Those not required or not permitted to file electronically must deliver any objection by U.S. mail, courier, overnight/express mail or in person at:

116 U.S. Courthouse
46 East Ohio Street
Indianapolis, IN 46204

The objecting party must also serve a copy of the written objection upon the Trustee's counsel, at Counsel for Trustee Deborah J. Caruso, Rubin & Levin, P.C., 135 N. Pennsylvania Street, Suite 1400, Indianapolis, IN 46204. **If an objection is NOT timely filed, the requested relief may be granted without a hearing.**

NOTICE IS FURTHER GIVEN that in the event an objection to this motion is timely filed, a hearing on this motion and such objection will be conducted on **December 19, 2018** at **1:30 p.m.** (prevailing Eastern time), in Room 325 of the United States Courthouse, 46 East Ohio Street, Indianapolis, IN 46204.

WHEREFORE, the Trustee respectfully requests entry of an order: (i) authorizing the Trustee, pursuant to the terms of the Settlement Agreement, to compromise and settle all claims and causes of action related to Facebook, including but not limited to, those claims and causes of action related to the Avoidance Claim; (ii) approving the Settlement Agreement; (iii) authorizing

the Trustee to retain the Settlement Payment in the amount of \$213,248.82 for the general administration by the Affiliated Debtors' bankruptcy estates, and (iv) granting the Trustee all other just and proper relief.

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: /s/ Meredith R. Theisen

Meredith R. Theisen

Deborah J. Caruso (Atty. No. 4273-49)
John C. Hoard (Atty. No. 8024-49)
James E. Rossow Jr. (Atty. No. 21063-29)
Meredith R. Theisen (Atty. No. 28804-49)
RUBIN & LEVIN, P.C.
135 N. Pennsylvania Street, Suite 1400
Indianapolis, Indiana 46204
Tel: (317) 634-0300
Fax: (317) 263-9411
Email: dcaruso@rubin-levin.net
johnh@rubin-levin.net
jim@rubin-levin.net
mtheisen@rubin-levin.net
Attorneys for Deborah J. Caruso, Trustee

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, a copy of the foregoing *Trustee's Motion to Compromise and Settle Avoidance Claim Against Facebook, Inc.* was filed electronically. Pursuant to Section IV.C.3(a) of the Case Management Procedures, notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

John Joseph Allman jallman@hbkfirm.com, dadams@hbkfirm.com
Richard Allyn rallyn@robinskaplan.com
Robert N Amkraut ramkraut@foxrothschild.com
Scott S. Anders scott.anders@jordanramis.com, litparalegal@jordanramis.com
Manuel German Arreaza manuel.arreaza@cfpb.gov
Todd Allan Atkinson tatkinson@ulmer.com
Darren Azman dazman@mwe.com
Kay Dee Baird kbaird@kdlegal.com, rhobdy@kdlegal.com; crbpgpleadings@kdlegal.com
Michael I. Baird baird.michael@pbgc.gov, efile@pbgc.gov
Christopher E. Baker cbaker@hbkfirm.com, thignight@hbkfirm.com

James David Ballinger jim@kentuckytrial.com, jennifer@kentuckytrial.com
Joseph E. Bant jebant@lewisricekc.com
William J. Barrett william.barrett@bfkn.com, mark.mackowiak@bfkn.com
Ashley Flynn Bartram ashley.bartram@oag.texas.gov
Alex M Beeman alex@beemanlawoffice.com, alexbeemanECF@protonmail.com
Thomas M Beeman tom@beemanlawoffice.com
Richard James Bernard rbernard@foley.com
Thomas Berndt tberndt@robinskaplan.com, jgerboth@robinskaplan.com
John J Berry john.berry@dinsmore.com, Christina.Lee@DINSMORE.COM
Lauren Beslow lauren.beslow@quarles.com
Brandon Craig Bickle bbickle@gablelaw.com
David J. Bodle dbodle@hhclaw.com, layres@hhlaw-in.com
Robert A. Breidenbach rab@goldsteinpressman.com
Wendy D Brewer wbrewer@fmdlegal.com, cbellner@fmdlegal.com
Kayla D. Britton kayla.britton@faegrebd.com, noticeFRindy@faegrebd.com
Robert Bernard Bruner bob.bruner@nortonrosefulbright.com
Jason R Burke jburke@bbrlawpc.com, kellis@bbrlawpc.com
Erin Busch ebusch@nebraska.edu
John Cannizzaro john.cannizzaro@icemiller.com, Deborah.Martin@icemiller.com
Kevin M. Capuzzi kcapuzzi@beneschlaw.com,
lmolinaro@beneschlaw.com;docket@beneschlaw.com
James E. Carlberg jcarlberg@boselaw.com,
mwakefield@boselaw.com;rmurphy@boselaw.com
Steven Dean Carpenter scarpenter1@dor.in.gov
Deborah Caruso dcaruso@rubin-levin.net, dwright@rubin-levin.net;jkrichbaum@rubin-levin.net;atty_dcaruso@bluestylus.com
Deborah J. Caruso trustee caruso@rubin-levin.net, DJC@trustesolutions.net
Joshua W. Casselman jcasselman@rubin-levin.net, angie@rubin-levin.net;atty_jcasselman@bluestylus.com
Ben T. Caughey ben.caughey@merchocaughey.com
Sonia A. Chae chaes@sec.gov
John Andrew Chanin jchanin@lindquist.com, srummery@lindquist.com
Courtney Elaine Chilcote courtney@ckhattorneys.com,
ckh@ckhattorneys.com;tracy@ckhattorneys.com
Eboney Delane Cobb ecobb@pbfc.com
Michael Edward Collins mcollins@manierherod.com
Michael Anthony Collyard mcollyard@robinskaplan.com, rhoule@robinskaplan.com
Eileen Connor econnor@law.harvard.edu
Lawrence D. Coppel lcoppel@gfrlaw.com
Heather M. Crockett Heather.Crockett@atg.in.gov, darlene.greenley@atg.in.gov
J Russell Cunningham rcunningham@dnlc.net, reaster@dnlc.net
David H DeCelles david.h.decelles@usdoj.gov
Dustin R. DeNeal dustin.deneal@faegrebd.com, noticeFRindy@faegrebd.com
Laura A DuVall Laura.Duvall@usdoj.gov, Catherine.henderson@usdoj.gov
Stephen Emedi semedi@law.harvard.edu
Abby Engen aengen@nmag.gov, eheltman@nmag.gov

Annette England annette.england@btlaw.com
Charles Anthony Ercole cercole@klehr.com, acollazo@klehr.com
Carolyn Meredith Fast carolyn.fast@ag.ny.gov
Elaine Victoria Fenna elaine.fenna@morganlewis.com
Andrew W Ferich awf@chimicles.com
Scott Patrick Fisher sfisher@drewrysimmons.com, lgarrison@DSVlaw.com
John David Folds dfolds@bakerdonelson.com, sparson@bakerdonelson.com
Jennifer N Fountain jfountain@iislaw.com, sfilippini@iislaw.com
Sarah Lynn Fowler sarah.fowler@mbcblaw.com, deidre.gastenveld@mbcblaw.com
Lydia Eve French lydia.french@state.ma.us
Carlos Galliani carlos@thelidjifirm.com
Jonathan William Garlough jgarlough@foley.com, mstockl@foley.com;mdlee@foley.com
Barry S. Gold bgold@mmlawus.com
John C Goodchild john.goodchild@morganlewis.com
Douglas Gooding dgooding@choate.com
John Andrew Goodridge jagoodridge@jaglo.com, angray@jaglo.com;dwhiggs@jaglo.com
Michael Wayne Grant michael.w.grant@doj.state.or.us
Richard Grayson Grant rgrant@rgglaw.com, grantecf@gmail.com
Alan Mark Grochal agrochal@tydingslaw.com
Elizabeth N. Hahn ehahn@rubin-levin.net, mralph@rubin-levin.net
Gregory Forrest Hahn ghahn@boselaw.com, jmcneeley@boselaw.com
Julian Ari Hammond Jhammond@hammondlawpc.com, ppecherskaya@hammondlawpc.com
Wallace M Handler whandler@swappc.com, kkloock@swappc.com
Adam Craig Harris adam.harris@srz.com
Brian Hauck bhauck@jenner.com
Jeffrey M. Hawkinson jhawkinson@pcslegal.com, danderson@pcslegal.com
Michael J. Hebenstreit mjh@whzlaw.com,
emw@whzlaw.com;arlene@whzlaw.com;ene@whzlaw.com
Amanda Marie Hendren amanda@indianalawgroup.com
Claude Michael Higgins Michael.Higgins@ag.ny.gov
Michael W. Hile mhile@jacobsonhile.com, assistant@jacobsonhile.com
Sean M Hirschten shirschten@psrb.com
Robert M. Hirsh robert.hirsh@arentfox.com
John C. Hoard johnh@rubin-levin.net, jkrichbaum@rubin-
levin.net;atty_jch@trustesolutions.com;sturpin@rubin-levin.net
Curt Derek Hochbein chochbein@rubin-levin.net, mralph@rubin-levin.net;lking@rubin-
levin.net;atty_chochbein@bluestylus.com
Jeffrey A Hokanson jeff.hokanson@icemiller.com, Kathy.peed@icemiller.com
Steven Howard Holinstat sholinstat@proskauer.com
Andrew E. Houha bkecfnotices@johnsonblumberg.com
Andrew W. Hull awhull@hooverhullturner.com, fgipson@hooverhullturner.com
James C Jacobsen jjacobsen@nmag.gov, eheltman@nmag.gov
Christine K. Jacobson cjacobson@jacobsonhile.com, assistant@jacobsonhile.com
Jay Jaffe jay.jaffe@faegrebd.com, noticeFRindy@faegrebd.com
Benjamin F Johns bfj@chimicles.com, klw@chimicles.com
Russell Ray Johnson russj4478@aol.com

Kenneth C. Jones kcjones@lewisricekc.com
 Anthony R. Jost tjost@rbelaw.com, baldous@rbelaw.com
 David J. Jurkiewicz DJurkiewicz@boselaw.com,
 mwakefield@boselaw.com;rmurphy@boselaw.com;clindsey@boselaw.com;dlingenfelter@boselaw.com
 Timothy Q. Karcher tkarcher@proskauer.com
 Alan Katz akatz@lockelord.com
 Richard B. Kaufman richardkfmn@gmail.com
 Carly Kessler ckessler@robinskaplan.com
 John M. Ketcham jketcham@psrb.com, scox@psrb.com
 Taejin Kim tae.kim@srz.com
 Edward M King tking@fbtlaw.com, lsugg@fbtlaw.com;tking@ecf.inforuptcy.com
 Roy F. Kiplinger bankruptcy@kiplingerlaw.com, bankruptcy@kiplingerlaw.com
 Jackson Taylor Kirklin taylor.kirklin@usdoj.gov, Kristie.baker@usdoj.gov
 James A. Knauer jak@kgrlaw.com, tjf@kgrlaw.com
 Kevin Dale Koons kkoons@kgrlaw.com, ncarson@kgrlaw.com
 Harris J. Koroglu hkoroglu@shutts.com, fsantelices@shutts.com
 Lawrence Joel Kotler ljkotler@duanemorris.com
 Robert R Kracht rrk@mccarthylebit.com
 Andrew L. Kraemer akraemer@johnsonblumberg.com, akraemerlawoffice@att.net
 David R. Krebs dkrebs@hbkfirm.com, dadams@hbkfirm.com
 Jerrold Scott Kulback jkulback@archerlaw.com
 Jay R LaBarge jlabarge@stroblpc.com
 Darryl S Laddin bkrfilings@agg.com
 Michael J. Langlois mlanglois@shouselanglois.com, rshouse@shouselanglois.com
 Vilda Samuel Laurin slaurin@boselaw.com
 Jordan A Lavinsky jlavinsky@hansonbridgett.com
 Todd Evan Leatherman todd.leatherman@ky.gov
 David S Lefere dlefer@mikameyers.com, jfortney@mikameyers.com
 Anthony Darrell Lehman alehman@hpwlegal.com
 Martha R. Lehman mlehman@salawus.com,
 marthalehman87@gmail.com;pdidandeh@salawus.com;lengle@salawus.com
 Gary H Leibowitz gleibowitz@coleschotz.com,
 blansinger@coleschotz.com;pratkowiak@coleschotz.com
 Donald D Levenhagen dlevenhagen@landmanbeatty.com
 Elizabeth Marie Little elizabeth.little@faegrebd.com
 Edward J LoBello elobello@msek.com
 Melinda Hoover MacAnally Melinda.MacAnally@atg.in.gov,
 Carrie.Spann@atg.in.gov;Kenyatta.Perman@atg.in.gov
 Christopher John Madaio Cmadaio@oag.state.md.us
 John A. Majors jam@morganandpottinger.com, majormajors44@yahoo.com
 Steven A. Malcoun dsmith@mayallaw.com
 Jonathan Marshall jmarshall@choate.com
 Thomas Marvin Martin tmmartin@lewisricekc.com
 Jeff J. Marwil jmarwil@proskauer.com,
 npetrov@proskauer.com;pyoung@proskauer.com;sholinstat@proskauer.com

Richard J Mason rmason@mcguirewoods.com
 C. Ed Massey mbracken@nkylawyers.com, cedmassey@nkylawyers.com
 Ann Wilkinson Matthews amathews@ncdoj.gov
 Rachel Jaffe Mauceri rachel.mauceri@morganlewis.com
 Michael K. McCrory mmccrory@btlaw.com, bankruptcyindy@btlaw.com
 Maureen Elin McOwen molly.mcowen@cfpb.gov
 Harley K Means hkm@kgrlaw.com,
 kwhigham@kgrlaw.com;cjs@kgrlaw.com;tjf@kgrlaw.com
 Toby Merrill tomerrill@law.harvard.edu, ppsl@law.harvard.edu
 Robert W. Miller rmiller@manierherod.com
 Jason Milstone jason.milstone@cmsenergy.com
 Thomas E Mixdorf thomas.mixdorf@icemiller.com, susan.cogdill@icemiller.com
 Evgeny Grigori Mogilevsky eugene@egmlegal.com, jolynn@egmlegal.com
 James P Moloy jmoloy@boselaw.com,
 dlingenfelter@boselaw.com;mwakefield@boselaw.com
 Ronald J. Moore Ronald.Moore@usdoj.gov
 Hal F Morris hal.morris@oag.texas.gov
 Michael David Morris michael.morris@ago.mo.gov
 Kevin Alonzo Morrissey kmorrissey@lewis-kappes.com, soliver@lewis-
 kappes.com;leckert@lewis-kappes.com;kwilliams@lewis-kappes.com
 Whitney L Mosby wmosby@bgdlegal.com, fwolfe@bgdlegal.com
 C Daniel Motsinger cmotsinger@kdlegal.com,
 cmotsinger@kdlegal.com;crbpgpleadings@kdlegal.com;shammersley@kdlegal.com
 Lee Duck Moylan lmoylan@klehr.com, acollazo@klehr.com
 Joseph L. Mulvey joseph@mulveyllc.com, linda@mulveyllc.com
 Abraham Murphy murphy@abrahammurphy.com
 Justin Scott Murray jmurray@atg.state.il.us
 Alissa M. Nann anann@foley.com, DHeffer@foley.com
 Henry Seiji Newman hsnewman@dglaw.com
 Kevin M. Newman knewman@menterlaw.com, kmnbk@menterlaw.com
 Cassandra A. Nielsen cnielsen@rubin-levin.net,
 atty_cnielsen@bluestylus.com,mralph@rubin-levin.net;lking@rubin-levin.net
 Ryan Charles Nixon rcnixon@lamarcalawgroup.com
 Isaac Nutovic inutovic@nutovic.com
 Gregory Ostendorf gostendorf@scopelitis.com, agregory@scopelitis.com
 Weston Erick Overturf wes.overturf@mbcblaw.com, deidre.gastenveld@mbcblaw.com
 Pamela A. Paige ppaige@plunkettcooney.com, amiller@plunkettcooney.com
 Eric Pendergraft ependergraft@slp.law, dwoodall@slp.law;bss@slp.law
 Danielle Ann Pham danielle.pham@usdoj.gov
 Jack A Raisner jar@outtengolden.com,
 kdeleon@outtengolden.com;jquinonez@outtengolden.com
 Jonathan Hjalmer Reischl jonathan.reischl@cfpb.gov
 Michael Rella mrella@mmlawus.com
 Caroline Ellona Richardson caroline@paganelligroup.com, anna@paganelligroup.com
 James Leigh Richmond James.Richmond@fldoe.org
 Mai Lan Gabrielle Rodgers Rodgers.MaiLan@pbgc.gov, efile@pbgc.gov

John M. Rogers johnr@rubin-levin.net, jkrichbaum@rubin-levin.net;atty_rogers@bluestylus.com
 Melissa M. Root mroot@jenner.com
 David A. Rosenthal darlaw@nlci.com
 James E Rossow jim@rubin-levin.net, ATTY_JER@trustesolutions.com;robin@rubin-levin.net;lisa@rubin-levin.net
 Rene Sara Roupinian rsr@outtengolden.com, jxh@outtengolden.com;kdeleon@outtengolden.com;rfisher@outtengolden.com;gl@outtengolden.com;jquinonez@outtengolden.com
 Victoria Fay Roytenberg vroytenberg@law.harvard.edu, jjimenez@law.harvard.edu
 Steven Eric Runyan ser@kgrlaw.com
 Craig Damon Rust craig.rust@doj.ca.gov, Lindsay.Bensen@doj.ca.gov
 Karl T Ryan kryan@ryanesq.com, lindsey@ryanesq.com
 Joseph Michael Sanders jsanders@atg.state.il.us
 Thomas C Scherer tscherer@bgdlegal.com, fwolfe@bgdlegal.com
 James R. Schrier jrs@rtslawfirm.com, lrobison@rtslawfirm.com;jlandes@rtslawfirm.com
 Ronald James Schutz rschutz@robinskaplan.com
 H. Jeffrey Schwartz jschwartz@robinskaplan.com
 Courtney Michelle Scott cscott1@dor.in.gov
 Joseph E Shickich jshickich@foxrothschild.com, vmagda@foxrothschild.com
 Randall R Shouse rshouse@shouselanglois.com, mlanglois@shouselanglois.com
 William E Smith wsmith@k-glaw.com, clipke@k-glaw.com
 Lauren C. Sorrell lsorrell@kdlegal.com, ayeskie@kdlegal.com;swaddell@kdlegal.com
 Berry Dan Spears berrydspears616@gmail.com
 Catherine L. Steege csteege@jenner.com, mhinds@jenner.com;thooker@jenner.com
 LaChelle D Stepp lstepp@steppjaffe.com, lastepp@yahoo.com
 Jason V Stitt jstitt@kmklaw.com
 Sharon Stolte sstolte@sandbergphoenix.com
 Jesse Ellsworth Summers esummers@burr.com, sguest@burr.com
 Jonathan David Sundheimer jsundheimer@btlaw.com
 Nathan L Swehla nswehla@graydon.law
 Nancy K. Swift nswift@buchalter.com, cbohnsack@buchalter.com
 Eric Jay Taube eric.taube@wallerlaw.com, annmarie.jezisek@wallerlaw.com;sherri.savala@wallerlaw.com
 Meredith R. Theisen mtheisen@rubin-levin.net, dwright@rubin-levin.net;mcruser@rubin-levin.net
 Meredith R. Theisen mtheisen@rubin-levin.net, atty_mtheisen@bluestylus.com;mralf@rubin-levin.net
 Jessica L Titler jt@chimicles.com
 Todd Christian Toral todd.toral@dlapiper.com, todd-toral-9280@ecf.pacerpro.com
 Ronald M. Tucker rtucker@simon.com, cmartin@simon.com,bankruptcy@simon.com
 Christopher Turner christopher.turner@lw.com
 U.S. Trustee ustpregion10.in.ecf@usdoj.gov
 Michael Ungar MUngar@mwe.com
 Sally E Veghte sveghte@klehr.com, acollazo@klehr.com
 Rachel Claire Verbeke rverbeke@stroblpc.com

Amy L VonDielingen avondielingen@woodmclaw.com
 Amy E Vulpio vulpioa@whiteandwilliams.com
 Carolyn Graff Wade Carolyn.G.Wade@doj.state.or.us
 Louis Hanner Watson louis@watsonnorris.com
 Jeffrey R. Waxman jwaxman@morrisjames.com,
 jdawson@morrisjames.com;wweller@morrisjames.com
 Christine M.H. Wellons christine.wellons@maryland.gov
 Philip A. Whistler philip.whistler@icemiller.com, carla.persons@icemiller.com
 Bradley Winston bwinston@winstonlaw.com, lwheaton@winstonlaw.com
 Brandon Michael Wise bwise@prwlegal.com
 Cathleen Dianne Wyatt cwyatt@fbtlaw.com, tacton@fbtlaw.com
 Joseph Yar jyar@nmag.gov, eheltman@nmag.gov
 James T Young james@rubin-levin.net, lking@rubin-
 levin.net;atty_young@bluestylus.com;mralf@rubin-levin.net
 James E. Zoccola jzoccola@lewis-kappes.com

I further certify that on November 28, 2018, pursuant to Section IV.C.3(c) of the Case Management Procedures, a copy of the foregoing *Trustee's Motion to Compromise and Settle Avoidance Claim Against Facebook, Inc.* was emailed to the following:

Arlington ISD/Richardson ISD: Eboney Cobb at ecobb@pbfc.com
 CEC Red Run, LLC: Alan M. Grochal at agrochal@tydingslaw.com
 SWRE Deal V Building, LLC: Paul Weiser at pweiser@buchalter.com
 Tarrant County/Dallas County: Elizabeth Weller at dallas.bankruptcy@publicans.com
 Northwest Natural Gas Company: Ashlee Minty at Ashlee.Minty@nwnatural.com
 Solar Drive Business, LLC: Chris W. Halling at challing@hallingmeza.com
 Market-Turk Company: Jordan A. Lavinsky at jlavinsky@hansonbridgett.com
 Taxing Authority for Harris County, Texas: John P. Dillman at houston_bankruptcy@lgbs.com
 Texas Comptroller of Public Accounts: Rachel Obaldo at rachel.obaldo@oag.texas.gov
 Clear Creek Independent School District: Carl O. Sandin at csandin@pbfc.com
 Synchrony Bank: Recovery Management Systems Corporation at claims@recoverycorp.com
 Bexar County: Don Stecker at sanantonio.bankruptcy@publicans.com
 SWRE Deal V Building, LLC: Nancy K. Swift at nswift@buchalter.com
 TN Dept. of Revenue: Michael Willey at michael.willey@ag.tn.gov
 Florida Department of Education: Benman D. Szeto at benman.szeto@fldoe.org
 Last Second Media, Inc.: T. Todd Egland at tegland@beldenblaine.com
 Hung Duong: Kevin Schwin at kevin@schwinlaw.com
 Travis County: Kay D. Brock at kay.brock@traviscountytexas.gov
 Able Building Maintenance: Scott D. Fink at bronationalecf@weltman.com
 Marathon Ventures, LLC: Daniel M. Karger at kargerlaw@gmail.com
 Oklahoma County Treasurer: Tammy Jones at tammy.jones@oklahomacounty.org
 JM Partners LLC: John Marshall at jmarshall@jmpartnersllc.com
 Facebook, Inc.: David Serepca at david@msllp.com

/s/ Meredith R. Theisen

Meredith R. Theisen

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